Farah Masyitah bt Nordin v Tan Sri Dr Mazlan bin Yusoff (named in the capacity as the Chairman of the Malaysian Education Service Commission) & Ors

HIGH COURT (IPOH) — APPLICATION FOR JUDICIAL REVIEW AA-25–6–02 OF 2024
MOSES SUSAYAN JC
8 JUNE 2025

Administrative Law — Judicial review — Application for — Dismissal from employment on allegation of absenteeism ('misconduct') accrued seven years ago — Failure to carry out disciplinary action immediately — Whether respondents actively reaffirmed applicant's role through continued advancement, rewards, and additional responsibilities though being aware of misconduct — Whether delay of carrying out disciplinary action violated natural justice — Whether there was lack of prior warnings — Whether there was tacit condonation of misconduct — Whether punishment of dismissal proportionate to alleged misconduct

The applicant began her career as a Pegawai Perkhidmatan Pendidikan ('DG41') ie a teacher at SMKA Sultan Azlan Shah in July 2014 under the second respondent. Early in her career, she faced significant personal hardships, including financial struggles, family issues, and emotional distress following two miscarriages. As a result, she was allegedly absent for 514 days between 19 January 2015 and 19 August 2016. Despite her challenges, she made efforts to return to work in August 2016 but continued to struggle with anxiety, fear, and lack of confidence. In January 2017, at her transfer request, she was transferred to SMK Aminuddin Baki ('SMK ABC'), where she regained stability and re-established herself as a dedicated and high-performing teacher. At SMK ABC, she consistently received outstanding performance ratings from 2017 to 2022, took on leadership roles, and actively contributed as a class teacher, exam supervisor, and student mentor. Her dedication was recognised with the Excellent Service Award ('APC') in 2022. Throughout these years, she was never warned, reprimanded, or informed of any pending disciplinary action for her past absenteeism, and she was granted salary increments, promotions, and benefits, which reinforced her belief that her past absence had been excused or condoned. However, on 6 July 2023, she was suddenly issued a 'show cause letter', alleging misconduct for her past absences from 2015 to 2016, and required her to respond within 21 days. In her written representation dated 20 July 2023, she explained her personal struggles, financial constraints, and family responsibilities. Despite her explanation, the second respondent upheld the charges, issuing a dismissal letter on 9 November 2023, stating that her written representation was insufficient. The

applicant argued that the seven-year delay in carrying out the disciplinary action violated natural justice, as she was allowed to work with a salary duly paid, promoted, and awarded for excellence without complaints for years. In her present application for judicial review, the applicant asserted that her termination was unfair and disproportionate, given the lack of prior warnings, failure to consider mitigating circumstances, and implied condonation of her past actions. The issues that arose for determination were: (a) whether the delay of seven years in initiating disciplinary action rendered the decision unfair and unlawful; (b) whether the disciplinary process complied with natural justice and procedural fairness; and (c) whether the punishment of dismissal was proportionate to the alleged misconduct.

Held, allowing the applicant's application:

(1) The alleged absenteeism occurred between January 2015 and August 2016. However, the disciplinary proceedings were only initiated in July 2023, after a lapse of seven years. The respondents offered no credible explanation for this undue delay. The consequence of such inaction was not merely administrative neglect but one that significantly undermined the applicant's ability to mount a meaningful defence and constitute procedural unfairness. More importantly, the respondents' conduct reflected a clear pattern of condonation. Despite being fully aware of the alleged misconduct, they permitted the applicant to remain in service, granted her salary increments, entrusted her with more and continued responsibilities, and awarded her the APC in 2022. This series of affirmative actions on the part of the respondents constituted more than a passive acquiescence; it amounted to tacit condonation (see para 24).

(2) The respondents had actively reaffirmed the applicant's role through continued advancement, rewards, and additional responsibilities, long after becoming aware of the alleged misconduct. These actions were inconsistent with any pending or intended disciplinary sanction. Rather than withholding recognition or increment in salary, the respondents repeatedly acknowledged the applicant's satisfactory service, culminating in a national-level performance award. Such conduct evidenced a deliberate waiver of the right to take disciplinary action against the applicant (see para 26).

(3) The respondents failed to initiate action within a reasonable time, failed to furnish full particulars or supporting documents to the applicant, and imposed a severe disciplinary penalty without adequately considering her unblemished record post-2016. The penalty imposed appears disproportionate and excessive, especially given the respondents' own conduct during the intervening period. These failures on the part of the respondents, both individually and collectively, amounted to serious breaches of natural justice and procedural fairness (see para 27).

(4) The respondents' conduct, which included prolonged inaction, clear procedural lapses, deliberate condonation, as well as the continued promotion and recognition of the applicant's performance during the period of alleged misconduct, were strong indicators that the employer had effectively condoned the conduct in question. Further, the respondents failed to provide adequate notice or sufficient opportunity for the applicant to present an effective defence. She was not furnished with detailed records of her alleged absenteeism, nor was she given reasonable time to prepare her response. The failure to provide supporting evidence at the material time and the absence of a proper inquiry process render the decision legally unsustainable (see paras 31–32).

(5) Even if absenteeism had occurred, the penalty of dismissal must be assessed in light of mitigating factors. These include the applicant's exemplary service from 2017 to 2023, her personal hardships, and the lack of prior warnings or corrective measures before dismissal. Here, the respondents failed to consider any mitigating factors, and the punishment of dismissal is found to be manifestly excessive. A lesser penalty, such as suspension or salary deduction, would have been more appropriate. The dismissal of the applicant was unlawful, procedurally unfair, and disproportionate to the alleged misconduct. The disciplinary decision was set aside (see paras 33–34).

(6) The applicant's dismissal was marred by undue delay, serious procedural defects, and a failure to consider mitigating circumstances, all of which rendered the disciplinary action unfair and unlawful. The respondents' prolonged inaction, coupled with continued affirmations of the applicant's performance, amounted to clear condonation. The disciplinary process violated the principles of natural justice, and the punishment was manifestly excessive. Accordingly, the applicant's dismissal was set aside (see para 35).

[Bahasa Malaysia summary

Pemohon memulakan kerjayanya sebagai Pegawai Perkhidmatan Pendidikan ('DG41'), iaitu seorang guru di SMKA Sultan Azlan Shah pada Julai 2014 di bawah responden kedua. Pada peringkat awal kerjayanya, beliau berdepan dengan kesukaran peribadi yang ketara, termasuk masalah kewangan, isu keluarga, serta tekanan emosi akibat dua keguguran. Akibatnya, beliau didakwa telah tidak hadir bertugas selama 514 hari antara 19 Januari 2015 hingga 19 Ogos 2016. Walaupun menghadapi cabaran tersebut, beliau berusaha untuk kembali bertugas pada Ogos 2016 tetapi terus mengalami kegelisahan, ketakutan dan kurang keyakinan diri. Pada Januari 2017, atas permohonan pertukaran beliau, beliau telah ditempatkan ke SMK Aminuddin Baki ('SMK ABC'), di mana beliau kembali stabil dan membina semula reputasinya sebagai seorang guru yang berdedikasi dan berprestasi tinggi. Di

SMK ABC, beliau secara konsisten menerima penilaian prestasi cemerlang dari 2017 hingga 2022, memikul peranan kepimpinan, serta aktif bertugas sebagai guru kelas, pengawas peperiksaan dan mentor murid. Dedikasi beliau turut diiktiraf melalui penganugerahan Anugerah Perkhidmatan Cemerlang ('APC') pada tahun 2022. Sepanjang tempoh tersebut, beliau tidak pernah diberi amaran, ditegur, atau dimaklumkan tentang sebarang prosiding tatatertib berhubung ketidakhadiran lampau dan beliau terus menikmati kenaikan gaji tahunan, pelarasan jawatan serta faedah perkhidmatan, yang mengukuhkan kepercayaannya bahawa ketidakhadiran lampau beliau telah dimaafkan atau dianggap telah dibiarkan. Namun demikian, pada 6 Julai 2023, beliau secara tiba-tiba telah diberikan surat tunjuk sebab yang mendakwa salah laku berhubung ketidakhadiran beliau pada tahun 2015 hingga 2016, dan menghendakinya memberikan maklum balas dalam tempoh 21 hari. Dalam representasi bertulis bertarikh 20 Julai 2023, pemohon menjelaskan kesukaran peribadi, kekangan kewangan dan tanggungjawab keluarga yang dihadapinya. Walaupun penjelasan tersebut diberikan, responden kedua mengekalkan pertuduhan itu dan mengeluarkan surat pemecatan pada 9 November 2023 atas alasan bahawa representasi bertulis adalah tidak memadai. Pemohon berhujah bahawa kelewatan tujuh tahun dalam melaksanakan tindakan tatatertib tersebut melanggar prinsip keadilan asasi, memandangkan beliau dibenarkan berkhidmat dengan gaji dibayar sepenuhnya, dinaikkan gaji, dinaik pangkat dan diberikan pengiktirafan tanpa sebarang aduan selama bertahun-tahun. Dalam permohonan semakan kehakiman ini, pemohon menegaskan bahawa pemecatannya adalah tidak adil dan tidak , mengambil kira ketiadaan amaran terdahulu, kegagalan mempertimbangkan faktor mitigasi, serta penerimaan tersirat terhadap tindakannya pada masa lalu. Persoalan yang timbul untuk diputuskan ialah: (a) sama ada kelewatan tujuh tahun dalam memulakan tindakan tatatertib menjadikan keputusan tersebut tidak adil dan tidak sah; (b) sama ada proses tatatertib tersebut mematuhi prinsip keadilan asasi dan keadilan prosedur; dan (c) sama ada tindakan pemecatan adalah seimbang dengan salah laku yang didakwa.

Diputuskan, membenarkan permohonan:

(1) Ketidakhadiran yang dikatakan berlaku antara Januari 2015 hingga Ogos 2016. Namun demikian, prosiding tatatertib hanya dimulakan pada Julai 2023, selepas tempoh hampir tujuh tahun. Responden tidak memberikan sebarang penjelasan yang munasabah berhubung kelewatan yang tidak wajar ini. Akibat daripada tindakan pasif sedemikian bukan sekadar satu kelalaian pentadbiran, tetapi telah menjejaskan keupayaan pemohon untuk mengemukakan pembelaan yang bermakna dan seterusnya mewujudkan ketidakadilan prosedur. Lebih penting, tindakan responden menunjukkan perbuatan yang dibiarkan ('condonation') yang jelas. Walaupun menyedari sepenuhnya dakwaan salah laku tersebut, responden membenarkan pemohon terus

berkhidmat, memberikan kenaikan gaji tahunan, mempercayainya dengan tanggungjawab tambahan dan berterusan, serta menganugerahkan kepadanya APC pada tahun 2022. Siri tindakan afirmatif oleh responden ini bukan sekadar suatu sikap berdiam diri atau toleransi pasif, tetapi merupakan suatu perbuatan yang dibiarkan secara tersirat (lihat perenggan 24).

(2) Responden secara aktif telah memperkukuhkan jawatan pemohon melalui kenaikan pangkat, pemberian ganjaran serta penganugerahan tanggungjawab tambahan, jauh selepas mereka mengetahui tentang salah laku yang didakwa. Tindakan-tindakan ini adalah tidak selaras dengan kewujudan sebarang tindakan tatatertib yang masih tertunggak atau yang dicadangkan. Bukannya menahan pengiktirafan atau kenaikan gaji, responden sebaliknya berulang kali mengiktiraf perkhidmatan pemohon yang memuaskan sehingga memuncak dengan penganugerahan anugerah prestasi peringkat kebangsaan. Tingkah laku sedemikian membuktikan suatu pelepasan hak secara sengaja ('deliberate waiver') untuk mengambil tindakan tatatertib terhadap pemohon (lihat perenggan 26).

(3) Responden telah gagal memulakan tindakan dalam tempoh yang munasabah, gagal membekalkan butiran penuh atau dokumen sokongan kepada pemohon dan telah mengenakan hukuman tatatertib yang berat tanpa menimbangkan dengan sewajarnya rekod perkhidmatan pemohon yang tiada cacat cela selepas tahun 2016. Hukuman yang dikenakan kelihatan tidak seimbang dan berlebihan, terutamanya mengambil kira tindakan responden sendiri sepanjang tempoh perantaraan tersebut. Kegagalan-kegagalan oleh responden ini, sama ada secara berasingan atau secara keseluruhan, merupakan pelanggaran serius terhadap prinsip keadilan asasi dan keadilan prosedur (lihat perenggan 27).

(4) Tingkah laku responden yang merangkumi kelewatan berpanjangan, kegagalan prosedur yang jelas, perbuatan yang dibiarkan yang disengajakan, serta kenaikan pangkat dan pengiktirafan yang berterusan terhadap prestasi pemohon sepanjang tempoh salah laku yang didakwa, merupakan petunjuk kukuh bahawa majikan secara efektif telah membiarkan perbuatan tersebut. Selain itu, responden gagal memberikan notis yang mencukupi atau peluang yang memadai kepada pemohon untuk mengemukakan pembelaan yang berkesan. Pemohon tidak dibekalkan dengan rekod terperinci mengenai ketidakhadiran yang didakwa dan tidak diberikan masa yang munasabah untuk menyediakan maklum balasnya. Kegagalan untuk mengemukakan keterangan sokongan pada masa yang material serta ketiadaan proses siasatan yang sewajarnya menjadikan keputusan tersebut tidak dapat dipertahankan dari sudut undang-undang (lihat perenggan 31–32).

(5) Sekalipun ketidakhadiran telah berlaku, hukuman pemecatan hendaklah

dinilai dengan mengambil kira faktor-faktor mitigasi. Ini termasuk rekod perkhidmatan cemerlang pemohon dari tahun 2017 hingga 2023, kesulitan peribadi yang dialaminya, serta ketiadaan sebarang amaran atau langkah pembetulan sebelum pemecatan. Dalam kes ini, responden gagal mempertimbangkan sebarang faktor mitigasi dan hukuman pemecatan didapati terlalu berat secara nyata ('manifestly excessive'). Hukuman yang lebih ringan seperti penggantungan atau pemotongan gaji adalah lebih sesuai. Pemecatan pemohon adalah tidak sah, tidak adil dari segi prosedur dan tidak seimbang dengan salah laku yang didakwa. Keputusan tatatertib tersebut telah diketepikan (lihat perenggan 33–34).

(6) Pemecatan pemohon telah dicemari oleh kelewatan yang tidak wajar, kecacatan prosedur yang serius, serta kegagalan untuk mempertimbangkan faktor-faktor mitigasi, yang keseluruhannya menjadikan tindakan tatatertib tersebut tidak adil dan tidak sah. Kelewatan berpanjangan responden, ditambah pula dengan pengiktirafan berterusan terhadap prestasi pemohon, merupakan perbuatan yang dibiarkan yang jelas. Proses tatatertib tersebut melanggar prinsip keadilan asasi dan hukuman yang dikenakan adalah terlalu berat secara nyata. Sehubungan itu, pemecatan pemohon telah diketepikan (lihat perenggan 35).]

Cases referred to

Azman bin Abdullah v Ketua Polis Negara [1997] 1 MLJ 263; [1997] 1 CLJ 257; [1997] 1 AMR 180; [1996] 2 MLRA 49, CA (refd)

Ganga Devi a/p Kumaran lwn Datuk Dr Madinah bt Mohamad (Pengerusi Lembaga Tatatertib Perkhidmatan Pendidikan Kumpulan Sokongan (No 1) Kementerian Pendidikan Malaysia) dan lain-lain [2022] MLJU 2695; [2022] CLJU 2532; [2022] MLRHU 2246, HC (refd)

Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor [2014] 5 MLJ 632; [2014] CLJU 574, CA (refd)

Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor [2021] 6 MLJ 750; [2021] 10 CLJ 737; [2022] 1 MLRA 96, CA (refd)

Nur Affaliza bt Mohd Arifin v Suruhanjaya Perkhidmatan Pelajaran Malaysia & Ors [2022] MLJU 1560; [2022] CLJU 1528; [2022] AMEJ 0937; [2022] MLRAU 147, CA (distd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573; [2008] 2 MLRA 273, FC (folld)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 638; [2011] 1 ILJ 479; [2010] 4 ILR 475; [2011] 3 AMR 38; [2025] MELRU 763, FC (refd)

Saiful bin Norddin v Suruhanjaya Pasukan Polis & Anor and another appeal [2023] MLJU 2344; [2023] CLJU 2134; [2023] AMEJ 2143; [2023] MLRAU 249, CA (refd)

Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [2007] 1 CLJ 300; [2007] 4 ILR 35; [2022] MLRHU 2367, HC (refd) A

Legislation referred to

Public Officers (Conduct and Discipline) Regulations 1993 B

Ernest Balasingam (with Afini bt Kamal Ariffin) (Gibb and Co) for the appellant.
Norazalinawati bt Mohd Arshad (Senior Federal Counsel, Perak State Legal Advisor's Offices) for the respondent.

Moses Susayan JC: C

INTRODUCTION

[1] For seven years, the respondents stood by in silence, taking no disciplinary action against the applicant, a school teacher, despite being fully D aware of her earlier absenteeism. During most of this time, the applicant served with dedication, earning promotions, commendations, and even an excellence award while serving as a teacher in another school. However, when she was eventually issued a show cause letter and responded with remorse, seeking to explain her circumstances, the respondents seized upon her apology as the basis E to terminate her. This case examines whether respondents' conduct of inaction, sudden punishment, and disregard for fairness, renders the dismissal unlawful, unfair, and legally unsustainable.

BACKGROUND FACTS F

[2] The applicant, Farah Masyitah bt Nordin began her career as a Pegawai Perkhidmatan Pendidikan ('DG41') ie a teacher at SMKA Sultan Azlan Shah ('SMKA SAS') in July 2014 under the second respondent. Early in her career, she faced significant personal hardships, including financial struggles, family G issues, and emotional distress following two miscarriages in 2013 and 2014. Her long daily commute from Bercham, Ipoh, to Seri Iskandar, where SMKA SAS was located, further impacted her health, leading to severe exhaustion and episodes of falling asleep while driving, all these affected her ability to attend work regularly. As a result, she was allegedly absent for 514 days between H 19 January 2015 and 19 August 2016.

[3] Despite her challenges, she made efforts to return to work in August 2016 but continued to struggle with anxiety, fear, and lack of confidence. In January 2017, at her transfer request, she was transferred to SMK Aminuddin I Baki ('SMK ABC'), where she regained stability and re-established herself as a dedicated and high-performing teacher. At SMK ABC, she consistently received outstanding performance ratings from 2017 to 2022, took on leadership roles, and actively contributed as a class teacher, exam supervisor,

and student mentor. Her dedication was recognised with the Excellent Service Award ('APC') in 2022. Throughout these years, she was never warned, reprimanded, or informed of any pending disciplinary action for her past absenteeism, and she was granted salary increments, promotions, and benefits, which reinforced her belief that her past absence had been excused or condoned.

[4] However, on 6 July 2023, she was suddenly issued a 'show cause letter', alleging misconduct for her past absences from 2015 to 2016, and required her to respond within 21 days. In her written representation dated 20 July 2023, she explained her personal struggles, financial constraints, and family responsibilities, including caring for her critically ill younger brother who required lifelong dialysis treatment. Her current school principal supported her written representation, affirming her commitment and exemplary service.

[5] Despite her explanation, the second respondent upheld the charges, issuing a dismissal letter on 9 November 2023, stating that her written representation was insufficient. The dismissal was backdated to 27 October 2023, though she was only officially informed on 23 November 2023, which was her last day of service, according to the letter of termination. The applicant argues that the seven year delay in carrying out the disciplinary action violated natural justice, as she was allowed to work with a salary duly paid, promoted, and awarded for excellence without complaints for years. She asserts that her termination was unfair and disproportionate, given the lack of prior warnings, failure to consider mitigating circumstances, and implied condonation of her past actions.

[6] The events, chronologically set out, are as follows:

(a) 19 January 2015 to 19 August 2016 — applicant's period of absenteeism from SMKA Sultan Azlan Shah ('SMKA SAS');

(b) January 2017 — the applicant was transferred to SMK Aminuddin Baki ('SMK ABC'), marking a turning point in her career after earlier difficulties;

(c) 2017 to 2022 — the applicant consistently received excellent annual performance ratings and commendations;

(d) 2022 — she was awarded the Excellent Service Award (*Anugerah Perkhidmatan Cemerlang* — APC) for her contributions to SMK ABC;

(e) 2017 to 2022 — during this period, the applicant also received salary increments and promotions. Although specific dates and formal letters are not provided, her claim is supported by cumulative recognition, work assignments, and acknowledgments from the school and her superiors;

(f) 6 July 2023 — a show cause letter was issued to the applicant, marking the first formal notice regarding her absenteeism from 2015 to 2016;

(g) 20 July 2023 — the applicant submitted a written representation in response to the show cause letter, explaining her personal circumstances and offering a defence; and

(h) 9 November 2023 — the dismissal letter was issued to the applicant, backdated to take effect from 27 October 2023.

ISSUES FOR DETERMINATION

[7] The primary issues before this court are:

(a) whether the delay of seven years in initiating disciplinary action rendered the decision unfair and unlawful;

(b) whether the disciplinary process complied with natural justice and procedural fairness; and

(c) whether the punishment of dismissal was proportionate to the alleged misconduct.

Whether the delay of seven years in initiating disciplinary proceedings rendered the decision unfair and unlawful

[8] The applicant contends that the seven year delay in initiating disciplinary action against her is unreasonable, procedurally unfair, and a breach of rules of natural justice. She argues that disciplinary proceedings must be initiated promptly, especially when they may result in severe consequences such as dismissal. The applicant maintains that her continued employment at the school to which she was transferred where she was given promotions, salary increments, and even an Excellent Service Award in 2022 indicates that the respondents had implicitly condoned her past absenteeism. She disputes the respondents' justification that the delay was due to investigations, asserting that all necessary employment records and attendance data were readily available. The applicant relies on a number of cases: *Ganga Devi a/p Kumaran lwn Datuk Dr Madinah bt Mohamad (Pengerusi Lembaga Tatatertib Perkhidmatan Pendidikan Kumpulan Sokongan (No 1) Kementerian Pendidikan Malaysia) dan lain-lain* [2022] MLJU 2695; [2022] CLJU 2532; [2022] MLRHU 2246 and *Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573; [2008] 2 MLRA 273 to support her claim that prolonged inaction, combined with continued employment, amounts to condonation, which makes subsequent disciplinary action unfair and unlawful.

[9] The Federal Court in *Vickneswary RM Santhivelu* reiterates a passage

from the decision of the Court of Appeal:

> [30] Since case authorities say that whether there is unreasonable delay depends on the circumstances of each case, delay per se cannot be construed against the appellant. In fact the Court of Appeal said so in its judgment. At para 3 of the Court of Appeal judgment, it said:
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> > ... It all depends on the facts of each case. In particular it depends on a number of factors, including the nature of the charge, the length of the delay, the reasons for the delay the opportunity which the employee had to evidentially meet the accusation leveled at him. *In the absence of any reasonable explanation, the longer the delay, the more difficult it would be for the disciplining body to justify the proceedings against the employee. Further, long delay may, when coupled with some other circumstances, amount to strong evidence of condonation on the part of the employer of the employee's misconduct.*
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> ...
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> [39] On the question of condonation raised by the respondent and referring to the case of *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263; [1997] 1 CLJ 257, I hold, in this present case, that there was no condonation. Condonation in the context of employment contract is an act by the employer to excuse or forgive him for the wrongful act committed by the employee. *Condonation can be in the active form ie, by the act of telling the person that he has been forgiven for the wrongful act done or by a passive act of not taking any action. Halsbury's Laws of England* (4th Ed) Vol 16 at p 439 para 648 describe condonation as follows:
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> > *An employer who with full knowledge of his employee's misconduct elects to continue him in service cannot subsequently dismiss him for the offence which he has condoned.* (Emphasis added.)

[10] The respondents, however, argue that there is no statutory limitation preventing them from initiating disciplinary action at any time. They maintain that the delay was necessary to conduct a thorough investigation and that the timing of the proceedings did not prejudice the applicant, as she was duly informed of the charges and given an opportunity to respond. They emphasised that prolonged absenteeism is a serious offense and that disciplinary action remains valid regardless of the delay.

[11] Despite this argument, the applicant argues that her legitimate expectation of continued employment was unfairly disrupted by the sudden disciplinary action. Having continued teaching with distinction for over seven years without any complaints or warning, she maintains that the inaction of the respondents fundamentally tainted the disciplinary proceedings, making them procedurally unfair and legally unsustainable.

Whether the disciplinary process complied with natural justice and procedural fairness

[12] The applicant asserts that the disciplinary process was procedurally flawed and violated natural justice in many ways. First, she argues that she was not provided with key evidence relied upon by the respondents to support the charge against her. The 'surat pertuduhan' ('charge letter') dated 6 July 2023, merely accused her of 514 days of absenteeism but failed to provide supporting documents detailing her attendance records. She contends that this lack of transparency severely prejudiced her ability to prepare an effective defence. She cites *Saiful bin Norddin v Suruhanjaya Pasukan Polis & Anor and another appeal* [2023] MLJU 2344; [2023] CLJU 2134; [2023] AMEJ 2143; [2023] MLRAU 249, where the Court of Appeal ruled that failing to disclose critical documents amounts to procedural impropriety, as it denies an accused officer the right to a fair hearing.

> [17] ... it was crystal clear that the respondents in the decision-making process had breached a cardinal rule of natural justice and had committed procedural impropriety when they failed to provide the appellant with vital documents, statements, reports and CCTV recordings. Without being in possession of the same, the appellants were certainly placed in a disadvantageous position in defending the allegations levelled against them. We are, hence, constrained to hold that the proceedings conducted by the DA in this instance is inconsistent with the rules of natural justice as enshrined in art 135(2) of the FC.

[13] The respondents counter that they had already established a prima facie case based on the available records and that no specific provision in the Public Officers (Conduct and Discipline) Regulations 1993 (PU(A) 395/1993) required them to furnish additional evidence unless requested. They argue that the charge letter contained sufficient details for the applicant to respond and that she never formally requested supporting documents during the disciplinary process.

[14] The applicant further challenges the accuracy of the charge, asserting that the 514-day absenteeism calculation was factually incorrect. She argues that the respondents failed to exclude non-working days, such as weekends, public holidays, and school breaks, which should not be counted as absenteeism. Upon recalculating, she found that the actual number of absent working days was only 337, not 514, meaning that the charge was grossly inflated. This, she argues, constitutes an *Anisminic* error, where a decision-making authority omits relevant considerations, thereby rendering the charge defective and legally flawed.

[15] Further, the applicant contends that the respondents failed to provide any reasons explaining why her representation was rejected. The decision letter dated 9 November 2023 merely stated that her defence was insufficient, without detailing why her explanation was not accepted. She relies on *Nazrul Imran bin Mohd Nor v Civil Service Commission Malaysia & Anor* [2021]

6 MLJ 750; [2021] 10 CLJ 737; [2022] 1 MLRA 96, where the court held that failure to provide reasons makes a disciplinary decision cannot be defended. The lack of reason for the decision, applicant argues, deprived her of the opportunity to challenge the findings properly, further violating procedural fairness. The Court of Appeal stated as follows:

> [65] It is incumbent on both respondents not to merely say the appellant did not exculpate himself in respect of the charge against him by the representation he had sent. These statements made that are without any basis given, no matter how strenuously made, remain devoid of any substance or weight. Both respondents, especially first respondent, are duty-bound to explain and give reasons for rejecting the grounds given by the appellant in his representation in answering the charge. Unfortunately, this was not done by the respondents as is evident from the affidavits filed.
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> [66] Further, the failure of the first respondent to explain why the appellant was found not able to exculpate himself, also gives credence to the contention that the first respondent did not sufficiently consider the appellant's defences. If indeed the first respondent had taken into account the appellant's defences and had rationally considered the same, surely reasons could be provided for rejecting the appellant's defences.

[16] Finally, the applicant argues that the denial of her right to appeal was a fundamental breach of justice. The dismissal letter did not inform her of any right to challenge the decision, contrary to para 11 of the *Pekeliling Perkhidmatan Sumber Manusia (Tatakelakuan dan Pengurusan Tatatertib Pegawai Awam)* (Ceraian UP 7.4.1) which mandates that all dismissal decisions must state the right to appeal to the Lembaga Rayuan Tatatertib ('LRTT') within 14 days. The respondents argue that she had no automatic right to appeal, as her dismissal was within the authority of the second respondent, but she insists that denying her access to an appeal mechanism was procedurally unjust. The relevant para 11 is append below:

> KEPUTUSAN DAN RAYUAN TATATERTIB
>
> 11. Keputusan PBTT hendaklah diberitahu kepada pegawai secara bertulis dan terus dilaksanakan sewajarnya meskipun ada rayuan dibuat terhadap keputusan itu. Surat keputusan tersebut hendaklah mengandungi fakta yang tepat berhubung keputusan yang dibuat oleh PBTT seperti dapatan salah atau pembebasan daripada pertuduhan yang telah dihadapkan dan/atau hukuman ke atas pegawai. *Surat keputusan juga hendaklah menyatakan peluang bagi membuat rayuan ke atas keputusan tersebut kepada Lembaga Rayuan Tatatertib (LRTT) dalam tempoh 14 hari dari tarikh surat keputusan diserahkan kepada pegawai.*

Whether the punishment of dismissal was proportionate to the alleged misconduct

[17] The applicant argues that even if absenteeism was proven, the punishment of dismissal was excessive and disproportionate given the mitigating factors in her case. She highlights that her personal hardships,

including financial struggles, family obligations, and mental health challenges, contributed to her absence. Despite these difficulties, she later rebuilt her career at SMK ABC, where she performed exceptionally well from 2017 to 2023. She received outstanding performance ratings, held leadership roles, and was awarded the Excellent Service Award in 2022. She argues that these factors should have been considered in determining an appropriate penalty, such as a warning, salary deduction, or suspension, rather than immediate dismissal.

[18] The applicant also emphasised that she was never given prior warnings about her absenteeism, nor was she subjected to any corrective measures before termination. She cites *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 638; [2011] 1 ILJ 479; [2010] 4 ILR 475; [2011] 3 AMR 38; [2025] MELRU 763, where the Federal Court ruled that disciplinary actions must consider proportionality, ensuring that punishments are justified in light of the circumstances. She asserts that the failure of the respondents to consider these factors demonstrates that the dismissal decision was made without proper evaluation. Justice Raus Sharif FCJ observed:

> [15] The Federal Court in a landmark decision has held that the *decision of inferior tribunals may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance*. It allowed the courts to go into the merit of the matter. (Emphasis added.)

[19] The respondents, however, maintain that absenteeism is a serious offense warranting dismissal, regardless of subsequent performance. They argue that disciplinary action is based on misconduct at the time of the offense and that her later achievements do not negate the severity of her past absenteeism. However, the applicant counters that the respondents' prolonged inaction, continued employment, and recognition of her work created a legitimate expectation that she would not face disciplinary action, and her sudden dismissal was unfair and unjustified.

[20] Further, the applicant challenges the respondents' order for salary repayment, arguing that it was unlawful. The disciplinary decision letter dated 9 November 2023 only imposed dismissal, but the fourth respondent later issued an oral directive requiring her to return her November 2023 salary and emoluments. She contends that this was an unauthorised additional penalty, imposed without legal basis. Moreover, the effective date of dismissal was backdated to 27 October 2023, when in fact, she only received formal notice on 23 November 2023, meaning that she continued working in good faith. She asserts that since she had already rendered her services for the said period before being officially notified, she is legally entitled to retain her salary.

[21] The respondents argued that the repayment was necessary, as her dismissal took effect from 27 October 2023. However, the applicant maintains that any deduction or repayment must be explicitly authorised by law and that an oral directive cannot override a written dismissal decision. She submits that the disciplinary penalties must comply strictly with the law and cannot be imposed arbitrarily. Given the lack of formal notification or legal basis for the salary repayment order, the applicant contends that it is invalid and must be set aside.

[22] Taken as a whole, the applicant contends that the excessive delay with the positive act of condonation, procedural irregularities, and the imposition of a punishment that was disproportionate to the alleged misconduct renders her dismissal unlawful and unsustainable, warranting its reversal by this court.

FINDINGS OF THE COURT

[23] Having carefully considered the evidence and legal arguments presented, this court finds in favour of the applicant. The disciplinary action taken against her is vitiated by procedural defects, excessive delay, and a punishment that was manifestly disproportionate to the alleged misconduct. Collectively, these deficiencies render the dismissal both unfair and unlawful.

[24] On the issue of delay, it is undisputed that the alleged absenteeism occurred between January 2015 and August 2016. However, the disciplinary proceedings were only initiated in July 2023, after a lapse of seven years. The respondents offered no credible explanation for this undue delay. The consequence of such inaction is not merely administrative neglect but one that significantly undermined the applicant's ability to mount a meaningful defence and constitute procedural unfairness. More importantly, the respondents' conduct in the interim period as outlined in para 6 above reflects a clear pattern of condonation. Despite being fully aware of the alleged misconduct, they permitted the applicant to remain in service, granted her salary increments, entrusted her with more and continued responsibilities, and awarded her the *Anugerah Perkhidmatan Cemerlang* in 2022. This series of affirmative actions on the part of the respondents constitutes more than a passive acquiescence; it amounts to tacit condonation. In *Vickneswary RM Santhivelu*, the Federal Court recognised that excessive delay in pursuing disciplinary action may lead to procedural unfairness, and this court finds that principle directly applicable here.

[25] In reaching this conclusion, the court has also considered the Court of Appeal's decision in *Nur Affaliza bt Mohd Arifin v Suruhanjaya Perkhidmatan Pelajaran Malaysia & Ors* [2022] MLJU 1560; [2022] CLJU 1528; [2022] AMEJ 0937; [2022] MLRAU 147. There, the court upheld the dismissal of a

teacher despite a delay in initiating disciplinary proceedings, clarifying that condonation requires a clear and deliberate act of forgiveness by the disciplinary authority. The court held that mere delay or inaction does not, by itself, amount to condonation unless accompanied by unequivocal conduct signifying an intent to waive the right to disciplinary action. In *Nur Affaliza*, the teacher's salary increments had been frozen and numerous correspondences, indicated that the employer had not excused the misconduct. Further, the court found that no procedural impropriety occurred as the appellant was afforded a fair opportunity to be heard, and there was no real prejudice.

[26] However, the present case is factually and legally distinguishable. Unlike in *Nur Affaliza*, the respondents here actively reaffirmed the applicant's role through continued advancement, rewards, and additional responsibilities, long after becoming aware of the alleged misconduct. These actions are inconsistent with any pending or intended disciplinary sanction. Rather than withholding recognition or increment in salary, the respondents repeatedly acknowledged the applicant's satisfactory service, culminating in a national-level performance award. Such conduct, when viewed cumulatively, evidences a deliberate waiver of the right to take disciplinary action against the applicant. Such conduct was wholly absent in *Nur Affaliza*.

[27] Furthermore, this court observes that key procedural fairness present in *Nur Affaliza* is missing in the present proceedings. The respondents failed to initiate action within a reasonable time, failed to furnish full particulars or supporting documents to the applicant, and imposed a severe disciplinary penalty without adequately considering her unblemished record post-2016. The penalty imposed appears disproportionate and excessive, especially given the respondents' own conduct during the intervening period. These failures on the part of the respondents, both individually and collectively, amount to serious breaches of natural justice and procedural fairness.

[28] It must also be noted that in *Vickneswary RM Santhivelu*, Tun Zaki J (as he then was) held that there was no condonation because the deceased was interdicted. Where else in *Nur Affaliza* the annual salary movement had been withheld for the relevant period from 2013 because of her absence from duty for 212 days. On the contrary, in the present case, the appellant continued to remain in service, granted her salary increments, entrusted her with more and continued responsibilities, and awarded her the *Anugerah Perkhidmatan Cemerlang* in 2022.

[29] The present case bears close resemblance to *Mohd Zulhazi Mohd Zulkafli v Suruhanjaya Pasukan Polis Diraja Malaysia & Anor* [2014] 5 MLJ 632; [2014] CLJU 574, where disciplinary action was only initiated after a

five-year delay. During that period, the appellant was promoted to Assistant Superintendent of Police and was shortlisted for an interview for promotion to Deputy Superintendent of Police. The Court of Appeal held that although the mere delay was not, in itself, sufficient to nullify disciplinary proceedings, the fact that the appellant was actively considered and promoted during that time amounted to condonation by the disciplinary authority. Her Ladyship Umi Kalthum Abdul Majid JCA observed:

> 19. Looking at these facts there was no doubt that there was a delay of five years since the alleged incident and the date when the appellant was given the show cause letter. Although delay per se was not a ground for holding that the disciplinary action should be held null and void ... the fact remained that during this period the appellant was promoted as Assistant Superintendent of Police and even considered for promotion for the post of Deputy Superintendent of Police.

[30] This approach followed the reasoning in *Azman bin Abdullah v Ketua Polis Negara* [1997] 1 MLJ 263; [1997] 1 CLJ 257; [1997] 1 AMR 180; [1996] 2 MLRA 49, where Abdul Malek Ahmad JCA stated at p 273 (MLJ):

> ... The delay in taking action must surely, in these circumstances based on the authorities, be an act of condonation ... if the issue of condonation had been taken into consideration, the trial judge's decision would surely have been the other way.

[31] In conclusion on this issue, while this court affirms the general principle established in *Nur Affaliza* that delay by itself is not sufficient to prove condonation, it finds that the circumstances of this case justify a different outcome. The respondents' conduct, which included prolonged inaction, clear procedural lapses, deliberate condonation, as well as the continued promotion and recognition of the applicant's performance during the period of alleged misconduct, are strong indicators that the employer had effectively condoned the conduct in question. Therefore, the dismissal of the applicant is set aside.

[32] On the issue of violation of natural justice, the court finds that the respondents failed to provide adequate notice or sufficient opportunity for the applicant to present an effective defence. She was not furnished with detailed records of her alleged absenteeism, nor was she given reasonable time to prepare her response. As established in *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626; [2007] 1 CLJ 300; [2007] 4 ILR 35; [2022] MLRHU 2367, an unfair process, regardless of the nature of the misconduct, is sufficient to invalidate a disciplinary decision. In this case, the failure to provide supporting evidence at the material time and the absence of a proper inquiry process render the decision legally unsustainable. The court, therefore, holds that the disciplinary action was procedurally defective and must be set aside.

[33] On the issue of proportionality of the punishment, the court emphasises that even if absenteeism had occurred, the penalty of dismissal must be assessed in light of mitigating factors. These include the applicant's exemplary service from 2017 to 2023, her personal hardships, and the lack of prior warnings or corrective measures before dismissal. In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*, the Federal Court affirmed that in judicial review cases, courts may examine not only procedural aspects but also the substance of a decision to ensure fairness. Here, the respondents failed to consider any mitigating factors, and the punishment of dismissal is found to be manifestly excessive. A lesser penalty, such as suspension or salary deduction, would have been more appropriate.

[34] Based on these findings, the court rules that the dismissal of the applicant is unlawful, procedurally unfair, and disproportionate to the alleged misconduct. The disciplinary decision is set aside.

CONCLUSION

[35] Having examined the facts and legal principles, the court finds that the applicant's dismissal was marred by undue delay, serious procedural defects, and a failure to consider mitigating circumstances, all of which rendered the disciplinary action unfair and unlawful. The respondents' prolonged inaction, coupled with continued affirmations of the applicant's performance, amounted to clear condonation. The disciplinary process violated the principles of natural justice, and the punishment was manifestly excessive. Accordingly, the applicant's dismissal is set aside and the court makes the following orders:

(a) declaration that the dismissal is null and void;

(b) certiorari order quashing the dismissal decision;

(c) mandamus order directing reinstatement to her last-held position, with no loss of seniority, salary, or benefits;

(d) declaration that the applicant is entitled to back pay and employment benefits to be paid to M/s Gibb & Co (client's account) as stakeholders;

(e) costs of RM20,000 to be paid by the respondents to the applicant; and

(f) compliance is required within 60 days from the date of the order.

Application allowed.

Reported by K Selvaraju